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*United States Circuit Court. District of Kansas.*

FARMERS' LOAN AND TRUST CO., TRUSTEE, v. B. S. HENNING, RECEIVER OF THE LEAVENWORTH, LAWRENCE AND GALVESTON RAILROAD CO.

Where a railroad company constructs and operates its road over its line, under the powers and privileges of its charter, it cannot thereafter abandon the same, even though its charter, in its inception, was merely permissive and not mandatory.

Where Congress donates lands to a state to aid in building railroads, there is a beneficial interest therein, vested in the state, and where such lands are granted to a railroad company, by the state, in consideration that the company shall build its road, and such grant is duly accepted, a valid contract is created, which is obligatory on the company, to *complete* its road; and compliance with such charter duty, and contract obligation, can be enforced by mandamus.

THIS was an application by the attorney-general of the state of Kansas for an order on the receiver of the Leavenworth, Lawrence and Galveston Railroad Company to repair and operate said railroad to the city of Leavenworth, the initial point named in its charter.

The railroad was in the hands of said receiver, who was appointed by this court in an action by the Farmers' Loan and Trust Company, trustee, to foreclose its mortgage against said railroad. The petition of the attorney-general recited the original and amended charters of said company, granted by the territory and state of Kansas respectively, and dated February 12th 1858, and February 29th 1864, by which said company was authorized to construct, maintain and operate a railroad from Leavenworth, by the way of Lawrence, to the southern line of the state.

Also, the grant of lands by the general government to the state of Kansas, to aid in the construction of said railroad, dated March 3d 1863; the act of the legislature accepting said grant by the state, and transferring the same to the said railroad company, dated February 13th 1864, and the acceptance by the company of the congressional grant and of the provisions of the said legislative act, dated March 12th 1864, the state grant of one hundred and twenty-five thousand acres of land, to aid in the construction of said railroad, dated February 23d 1866, and the acceptance of the same by the company, dated May 16th 1866.

Also, an act of the legislature changing the name of said company from the Leavenworth, Lawrence and Fort Gibson Railroad Company to the Leavenworth, Lawrence and Galveston Railroad Company, approved February 24th 1866.

And the said petition further alleged that said railroad company did, in pursuance of its charter and agreements, construct, and since the year 1872 did operate and maintain its road, from a point of junction with the Kansas Pacific Railroad, on the north side of the Kansas river, opposite the city of Lawrence, to the south line of the state, and did, under an agreement with the Kansas Pacific Company, run its cars and transport its freight and passengers over said last-named railroad, from its junction therewith to and from the city of Leavenworth, thus making a continuous line from said city, via Lawrence to the south line of the state. That said Henning was appointed receiver of said railroad by an order of this court on the 5th day of March 1875, and that said receiver continued to operate and maintain said road, as aforesaid, until the 8th day of June 1877. That since said last mentioned date said receiver has refused and neglected, and does still refuse and neglect, to operate said railroad from Lawrence to Leavenworth, or to run its cars for transporting freight and passengers to and from Leavenworth, under said agreement with the Kansas Pacific Company, and has abandoned said line of road, and refuses and neglects to maintain the bridge of said company across the Kansas river at Lawrence, and has permitted the same to remain unused and to go to decay, to the great damage of the commerce of the state, and especially of the cities of Leavenworth and Lawrence, and to the detriment of the travelling public; and praying for an order that said receiver be required to repair and maintain said railroad and bridge, and operate said road, as heretofore, from Leavenworth to Lawrence, and from thence to the southern line of the state, as provided by its said charter.

To this petition the receiver filed a general demurrer.

*Willard Davis*, Attorney-General, and *H. B. Johnson*, for the state.

*Wallace Pratt* and *S. O. Thatcher*, for respondent.

The opinion of the court was delivered by

FOSTER, J.—The allegations of the petition standing confessed, and no question being made as to the form of the proceedings, the main question is to determine what obligations and duties the railroad company owes to the state, under its charter and the grants of land by the general government and the state, and the acceptance

thereof by said company. And to these questions the arguments of counsel have been addressed, and have taken a wide range.

It appears to be well supported by authority and reason that the powers and privileges granted by the charters of this company are permissive only, and not obligatory, and the company could elect whether it would proceed to exercise the franchises thereby granted, or whether it would not. And if it chose the latter course, the only penalty would be a forfeiture of the rights and privileges conferred: *York & North Midland Railroad Co. v. The Queen*, 1 E. & B. 855; *State of Minnesota v. The Southern Minnesota Railroad Co.*, 18 Minn. 40; High's Extraordinary Legal Remedies, sect. 316.

It was held by the Court of Exchequer Chamber, in the case first above cited, that the mandamus would not lie to compel the company to exercise its franchises as to a part of the route named in its charter, and abandoned by the company when it had not actually proceeded to build or operate its road over the part abandoned, and no corrupt motives are imputed to the company in abandoning the line. But when the company has once built and operated its railroad between the points named in its charter, the case seems to stand on different grounds, and it seems the company may be compelled by mandamus to carry out the objects for which it was created, and to exercise its charter obligations.

The following cases sustain and carry out this view: *State v. The Hartford & N. H. Railroad Co.*, 29 Conn. 538; *King v. Severn & Wye Railroad Co.*, 2 B. & Ald. 644; High's Ex. Legal Remedies, sects. 317, 319, 320; *The People ex rel. v. The Troy & Boston Railroad Co.*, 37 How. Pr. 427; *The People v. The Albany & Vermont Railroad Co.*, 24 N. Y. 261; Same case, 37 Barb. 216.

The case last cited has been referred to by defendants' counsel as a strong case in defendants' favor, and it is urged that the only remedy of the state is to take proceedings to annul and forfeit the franchises of the company. But upon examination of the case in 24 N. Y., it will be seen that the opposite doctrine is held by a majority of the judges. That proceeding was not by mandamus, but was a proceeding by the attorney-general for an injunction, and for the specific performance of the charter obligations of the company, and the main question to be decided was whether such a proceeding could be sustained.

It is true Judge WRIGHT, who delivered the opinion of the court,

went farther, and not only argues that the action could not be maintained, but that by no proceeding could the company be compelled to keep up and operate its road, and that the only remedy the people had was indictment or proceedings to forfeit the franchise. But while all the judges concurred in the *conclusion*, *i. e.*, that the judgment of the Supreme Court dismissing the bill should be affirmed, four out of the six judges sitting in the case "however were of the opinion that a corporation is under a legal obligation to exercise its franchises, and that it has not the option to discontinue a part of its road and forfeit its franchise. They agree that the remedy is not by action in equity for a specific performance, but by mandamus or indictment, or, at the election of the people, by proceeding to annul the existence of the corporation." So it is apparent this case is in point that the state may proceed, by mandamus, to compel the company to exercise its corporate powers when it has once constructed and operated its road. Having entered upon the exercise of its charter franchises it then owes a duty to the public which it may not, at its caprice, abandon. And in equity and good conscience the obligation is still greater where the company has been the recipient of land grants and subsidies to aid the construction of its road.

Having said this much as to the rights, privileges and duties of the company under its charter, I might rest this case here. But as the legal effect of the land grants made to and accepted by the company has been discussed by the counsel, I will briefly state the view in which that matter presents itself to my mind. Undoubtedly the ultimate object of the Congress in granting lands to aid the construction of a railroad from Leavenworth via Lawrence, to the southern line of the state, was to secure the construction and operation of the road from the initial point named in the act of Congress.

This was a grant *in presenti* to the state of Kansas, in trust to aid the construction of two designated lines of railroad, and the lands could not be diverted to any other purpose. It seems to be the settled doctrine of the Supreme Court of the United States that grants of this nature are not mere naked trusts, but vest a *beneficial interest* in the state. In the case of the United States against this same company, known as the *Osage Land Case*, 2 Otto 748, the court, speaking of this Act of Congress, uses this language: "The scope and effect of the Act of 1863 cannot, in our opinion, be misunderstood. The different parts harmonize with

each other and present in a clear light the scheme as an entirety. Kansas needed railroads to develop her resources, and Congress was willing to aid her to build them, by a grant of a part of the national domain." \* \* \*

In the case of *Rice v. Railroad Co.*, 1 Black 378, 379, the Supreme Court had under consideration an Act of Congress of 1854, granting lands to the territory of Minnesota to aid in the construction of a railroad, which act contained these words: "No title shall vest in the territory of Minnesota." And the court held in that case, by reason of this provision in the act that no present beneficial interest passed to the territory, and that previous to any rights becoming vested under it, Congress could revoke the grant. But it will be seen, at pages 378-9 and 381, the court draws a distinction between grants like this one and the Minnesota grant, and refer to their decision in the case of *Lessius v. Price*, 12 How. 76, and Justice NELSON, in his dissenting opinion, at page 382, again reiterates the same doctrine and says: "The grantee in all such cases takes a beneficial interest in the grant, as the representative of the persons for whose benefit it is made."

The state of Kansas was interested in building railroads within her limits, and thus developing her resources and inducing immigration to the state, and surely had a particular interest in securing the purpose for which this grant was made. This grant was not made to the Leavenworth, Lawrence and Fort Gibson Railroad Company, or to any other company. The power was clearly vested in the state to select the company to build the road, and generally to direct and control the grant for the purposes named in the Act of Congress. And it is fair to assume that the state, as trustee, having an interest in the grant, could impose such proper terms and conditions, in executing the trust, as were not in conflict with the provisions of the act, and were best calculated to secure the object contemplated; and the company having given its consent to such terms and conditions, and received the lands, was bound to comply with its agreement.

In sect. 2 of the act of the legislature, accepting the grant and transferring it to the railroad company, are these words: "In consideration that the Leavenworth, Lawrence and Fort Gibson Railroad and Telegraph Company shall construct a railroad and telegraph from the city of Leavenworth, by way of the town of Lawrence \* \* \*, to the southern line of the state, in the direction

of Galveston Bay \* \* \*, the state of Kansas hereby agrees to grant, bargain and sell to said company all that portion of lands granted to the state by the above-named Act of Congress, applicable to the construction of the above-described railroad."

Said act further provided that the company should, within six months, file its acceptance of the provisions of this act with the secretary of state, and, in default thereof, all grants and provisions therein contained as to this company shall cease and be void.

To this act the company filed the following acceptance of March 12th 1864: "Resolved, by the president and board of directors of the Leavenworth, Lawrence and Fort Gibson Railroad Company, that said company hereby accept said grant of lands according to the stipulations of said act of the legislature of the state of Kansas and of the Congress of the United States.

"Resolved, that the secretary be and he is hereby instructed to transmit to the office of the secretary of state of Kansas a copy of the above acceptance of said grant of land."

It seems apparent to my mind that the first stipulation of the act was that the company should build its road from the city of Leavenworth, and that its acceptance, by the company, created an obligation on the part of the company by which it was bound to build its road from that point; and even if the state imposed a condition not contained in the grant, as it was acceded to by this company, it cannot now object, and it is bound by its agreement: *Baker v. Gee*, 1 Wall. 333. I am therefore of the opinion that the state has the right to require the said railroad company to exercise the franchises of its charter over the abandoned portion of its line, because:—

1. Having constructed and maintained and operated its road over said line, under the powers and privileges of its charter, it cannot thereafter, at its option, abandon the same.

2. The stipulation in the second section of the said act of the legislature, and the acceptance of said act by the company, created a contract, obligatory on the company, to build its railroad from the city of Leavenworth.

The demurrer must be overruled.

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